Taxation of cross-border inheritances and donations: suggestions for improvement

Dafnomilis, V.

CHAPTER 3

The starting point of this study

In the course of my research, I identified the following problems of cross-border death and gift taxation: double or multiple taxation and non-taxation, discriminatory treatment of cross-border inheritances and donations and administrative difficulties. I discuss these problems in section 3.1 of this chapter. Furthermore, those problems are confirmed, in my view, by the OECD IHTMTC and the 2015 inheritance tax report. Therefore, the selection of these problems in the context of this study becomes less arbitrary because it is confirmed by those two documents that serve as the two points of reference of this study. The OECD IHTMTC and the 2015 inheritance tax report will be presented in section 3.2 of this chapter. Finally, in section 3.3 I discuss at which level the problems of cross-border death and gift taxation should be most effectively addressed.

3.1 The problems of cross-border death and gift taxation

3.1.1 Double or multiple taxation

Double or multiple taxation is the first important problem of cross-border death and gift taxation. As national death and gift tax laws vary significantly from state to state, these differences often give rise to double or multiple taxation, which is not always effectively addressed by unilateral double tax relief provisions. After all, one may claim that the OECD IHTMTC efficiently addresses double taxation. This, however, may not always be true in certain situations, as I will discuss in chapter 5 of this study. In the next sections, I present some elements of death and gift tax laws that often result in double or multiple taxation of cross-border inheritances and donations.

3.1.1.1 Variety of concepts determining the personal nexus between a person and a state

As mentioned in chapter 2 of this study, the jurisdictional scope of inheritance and gift taxes – two representative examples of death taxes and taxes on gifts, respectively – is mainly determined by a personal nexus rule, which, if satisfied, results in a worldwide tax liability. Countries assess this nexus either at the level of the deceased or the beneficiaries or even at both levels of the deceased and the beneficiaries based on one or more concepts. The most representative personal nexus concepts are residence, domicile and nationality. However, the diverging interpretation of these concepts and the application of different concepts to a cross-border inheritance and donation may often give rise to double or multiple taxation of the *mortis causa* or *inter vivos* transferred property.

3.1.1.1.1 Residence

Unlike income taxation where the residence of an individual is assessed by certain factors,[1] sometimes in combination with a day-count test,[2] the concept of residence for inheritance and gift tax purposes is a more complex issue. In the course of my research, I identified five categories of states concerning the application of the concept of residence for inheritance and gift tax purposes.

The first category includes states that rely on the income tax concept of residence to determine tax residence for inheritance and gift tax purposes.[3] This concept focuses on the physical presence of a person in a state, which is assessed by several, easily observable factors. A day-count rule can also apply in this respect.

The second category refers to states that rely on the civil law concept of residence,[4, 5] which evaluates several factual circumstances (the "corpus") and the intention of the person to stay within their territory (the "animus").[6] The civil law concept of residence or, at least, the consideration of a person's intention to live in a state for determining tax residence for inheritance or estate tax purposes seems to be more suitable for death tax purposes. Rust noted in that regard that "[a]s all transfers of wealth from one person to another – like bequest, legacy, statutory share and donation [heir, inheritance, timing of death] – are terms used in the civil code, it seems natural to give to these terms the same meaning as in the civil code. It is then only a small step to interpret the term 'residence' as well in accordance with the meaning given by the civil code."[7] Inheritance and gift taxes are wealth taxes that are not periodically levied like income tax. In the context of income tax, the attachment of a person to a state needs to be determined every year, and therefore, a factual interpretation coupled with a day-count rule may suffice. However, the residence concept for inheritance and gift tax purposes should reflect, according to Rust, a lifelong or at least a long-lasting connection between the person and state and should ideally consider how much wealth was accrued during that time.[8]

---

1 For instance, the availability of a permanent home, the place of residence of the taxpayer's family, the place where the children go to school, the place of banking, and the place of work, amongst other things.

2 Similar to the one used in income tax treaties – the "183-day rule".

3 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87 and Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 7.

4 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87.

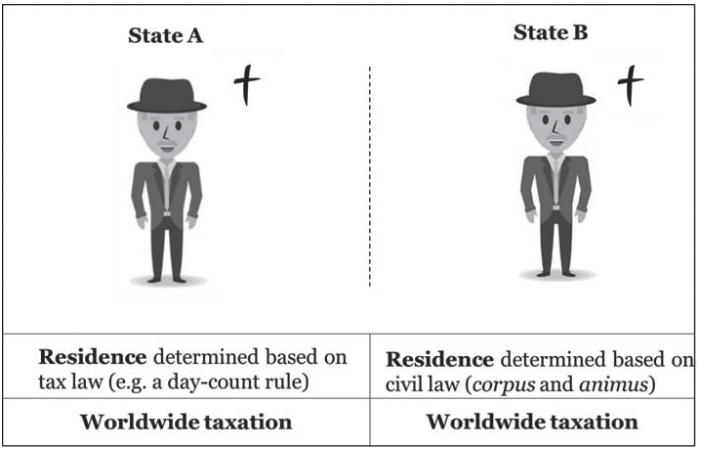
5 For example, a person who spends several years in a foreign hospital will nonetheless be considered resident for the purposes of inheritance tax or estate tax in the state where his family resides, as the intention of this person matters.

6 In that regard, it could be argued that a civil law concept of residence for tax purposes bears similarities to the concept of domicile. Nevertheless, the common law concept of domicile attributes much more significance to the intention of the person compared to that attributed by the civil law concept of residence.

7 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87.

8 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87.

Notwithstanding the above, I observe that, if for inheritance and gift tax purposes one state applies the income tax concept of residence and another state applies the civil law concept, the cross-border inheritance and/or donation may be taxed by both states given that they could regard the deceased as a resident of their territory – the first by applying a day-count rule, and the latter by assessing his *corpus* and *animus*.



The third category refers to states that resort to a more factual interpretation[9] to determine the tax residence of a person for inheritance and gift tax purposes. Consequently, they consider that a person is a tax resident in their territory if, for example, he has family relations and/or the centre of his business relations there.

The fourth category includes states where residence for inheritance and gift tax purposes is defined as the possession of housing space.[10] Therefore, it can be established very easily, by the performance of certain transactions connected to immovable property located in the state, for instance, by renting a property and using it with a certain frequency. It follows that double taxation may arise if one state applies the civil law concept of residence and the other state defines residence as the mere possession of housing space for inheritance or estate tax purposes. For example, a person, who moves to a state for work (with the intention of staying there twice per week) and dies there a few days after his arrival, may be considered resident for inheritance or estate tax purposes there and, thus, his worldwide property will be subject to inheritance tax or estate tax by that state. However, the state of his "actual" residence may also levy an inheritance tax or an estate tax on his worldwide property as he intended to live there with his family. The same applies if this person dies

9 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 11, 24.

10 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87 and Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 23.

in the state where his family was residing while possessing a housing space for working purposes in the other state.[11]

Finally, it is worth mentioning that there are states that apply a concept of residence that is different from that of tax or civil law residence.[12]

Several variations of the concept of residence exist, the most important being the extended residence rules (usually based on the deceased's or beneficiary's nationality), considering that the residence criterion is susceptible to abuse. States thus combine the concept of residence and nationality[13] to prevent abusive tax planning and, therefore, impose a worldwide liability concerning the property owned by their nationals or sometimes residents who move to another state some years before their death (trailing tax regime). Such a taxing right is usually retained for a limited period upon the deceased's immigration to another state. However, if one state levies taxes based on the deceased's "actual" residence and the other on the deceased's extended residence, double taxation of the cross-border inheritance is possible.[14] This type of double taxation that gives rise to worldwide taxation of the deceased's worldwide property in both states, may be eliminated if the state that applies the extended residence rules grants relief for the taxes paid in the state of the deceased's actual residence.

3.1.1.1.2 Domicile

Common law states often apply the concept of domicile as a personal nexus concept. The common law concept of domicile requires a physical presence in combination with the intention of a person to stay *indefinitely* in a state.[15] The requirements of the physical presence and the intention of staying *indefinitely* set a very high hurdle, leading to the assumption that an individual is still subject to tax in his former home state despite having lived several years in another state. This is the case where he might be considered to have the intention to return home one day. Rust maintained that the common law domicile does not seem to be the ideal solution for inheritance tax purposes as even a domicile can be established and given up if the individual moves from one state to another while harbouring the intention of leaving his home state forever and staying permanently in the new state.[16] Finally, it is noted that there are states that apply extended domicile rules to migrating individuals for anti-tax abuse purposes.

Considering the above, I observe that double taxation of an inheritance or donation is possible if one state applies the common law concept of domicile whereas the other applies the civil law concept of residence. This is because the states concerned assess the

11 See also Anja Taferner, "Avoidance of Double Inheritance Taxation in Cases of Double Residence," *European Taxation* 39, no. 12 (1999): 486-488.

12 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87.

13 In such a case, nationality operates as a dependent personal nexus concept.

14 See also, Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985), 39.

15 I draw a distinction between the common law concept of domicile (which assesses the intention of the person to stay indefinitely in a state) and the civil law concept of domicile that I regard as residence determined under civil law.

16 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto, (Amsterdam: IBFD, 2010), 89.

deceased's intention under different standards. This would arise where an executive of an international company was assigned to work for a certain period outside his own country. In such instances, the absence of a tax convention may prove extremely problematic.[17, 18]

3.1.1.1.3 Nationality

A few states levy inheritance and gift taxes based on the nationality of the person independently or in combination with the previous criteria (extended residence/domiciled rules).[19]

It could be argued that if states desire to establish a permanent link with their individuals, they should tax them based on their nationality. Nationality establishes the longest-lasting link between a person and a state. Furthermore, it is difficult for a person to acquire a new nationality without having lived a minimum number of years in another state. Therefore, it would seem ideal for inheritance and gift tax purposes given that it guarantees a long-lasting link between a person and the state concerned. On the other hand, it has been argued that taxation based on nationality might not be ideal and reasonable for inheritance and gift tax purposes given that people build their wealth in their state of residence, which should have the right to tax their wealth. In that regard, Rust put forward that the taxation of nationals of a state living abroad and the non-granting of any (or only a few) public goods to them, and the non-taxation of aliens and the granting of public goods to them is apparently contrary to the idea that taxes should be paid in consideration for public goods provided by the government.[20]

Regardless of the above, double taxation is possible if one state establishes its worldwide tax jurisdiction based on the nationality of a person while the other on his residence: if the deceased, national of the first state, resided in the latter state, both states might seek to tax the worldwide inherited or donated property, as seen in the following graphic.

17 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 13.

18 Sanford H. Goldberg, "Estate tax conflicts resulting from a change in residence: double taxation resulting from the application of capital gains and death taxes," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 30.

19 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 24.

20 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto, (Amsterdam: IBFD, 2010), 89-90.

State A	State B
	
Nationality	**Residence**
Worldwide taxation	**Worldwide taxation**

3.1.1.2 Assessment of the personal link with a different person (donor-based and donee-based taxes)

Not all states assess the personal nexus concepts at the level of the deceased. Although a vast majority of the states establish worldwide tax jurisdiction if the deceased had a personal link with their territory (for instance, if he resides or is a national of that state), some states establish worldwide tax jurisdiction if the beneficiary has a personal nexus with their territory.[21, 22]

The parallel application of death tax legislation, assessing the personal link at a different person may often result in double taxation. This is possible, for instance, if State A imposes worldwide inheritance tax liability on the beneficiary because the deceased was residing in its territory at the time of his death, whereas State B imposes worldwide inheritance tax liability because the beneficiary resides in its territory.

21 See more, Willem van Der Berg, "Future of Inheritance and Gift Tax Treaties," in *Tax Treaty Policy and Development*, ed. Markus Stefaner and Mario Züger (Vienna: Linde Verlag, 2005), 526.

22 The assessment of the personal nexus is important for determining the person on whom the tax is calculated rather than the person that is liable to pay the tax.

State A	**State B**
	
Residence of the **beneficiaries**	Residence of the **deceased**
Worldwide taxation	**Worldwide taxation**

Furthermore, it is uncertain whether State A will provide double taxation relief for the tax paid in State B (see also section 3.1.1.10) as it was assessed on a different person (albeit being paid by the same taxable person).

3.1.1.3 Different taxable persons

As noted in chapter 2, death may often trigger two common types of taxes among the states, namely an inheritance tax or an estate tax. The taxable person for the application of an inheritance tax is the beneficiary while the taxable person for the application of an estate tax is, depending on the legislation of the state, either the estate or the deceased. The difference in taxable persons in the event of a cross-border inheritance may often give rise to double taxation in a cross-border setting.[23] According to Maisto, "[a] few states only provide relief if the foreign tax is levied on a different taxable person, as most states require the foreign tax to be borne by the same taxpayer claiming relief so that, a foreign tax levied on the estate as a taxable person or on the deceased person would not be creditable […]."[24] The same is expected to happen if one state levies inheritance taxes and another state levies capital gains taxes upon a deemed disposition of the deceased's property. In the former state, the beneficiaries are liable to pay the tax while in the latter the deceased becomes the relevant taxpayer with the deceased's beneficiaries filing his last income tax return.

3.1.1.4 Different types of taxes

As noted in section 2.1, there are different types of death taxes and taxes on gifts. Therefore, not all states levy the same type of death tax and tax on gifts. For example, one state may

23 See also Sanford H. Goldberg, "Estate tax conflicts resulting from a change in residence: double taxation resulting from the application of capital gains and death taxes," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 34.

24 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 42.

levy an inheritance tax and the other state may levy a *mortis causa* income tax or capital gains tax on the cross-border inheritance. As a result, the cross-border inheritance is taxed twice by two different states and with two different types of taxes. In the same vein, one state may levy a gift tax on a cross-border donation and the other an income tax on gifts. It is noted that in such a case, both states qualify the transfer of property as a donation. However, they subject it to two different types of taxes.

Although one could argue that the imposition of different types of taxes on the cross-border inheritance or donation is not classified *per se* as juridical double taxation, the mere reduction of the value of the *mortis causa* or *inter vivos* transferred property and the multiplication of the tax burden should not be neglected.

3.1.1.5 Connection with civil law

3.1.1.5.1 Determination of critical terms by civil law

Several terms used by death and gift tax laws are usually determined by civil law (family law, matrimonial property law and the law of succession) whereas other terms are defined by the inheritance and gift tax legislation itself. In an internal situation, this may not give rise to problems, but it can be bothersome in a cross-border setting. The civil laws differ noticeably from state to state and contain a mixture of rules, which range from ownership law (which considers issues such as the identification of assets owned by the deceased upon his death) and matrimonial law (whose concerns include same-sex marriage, the rights of couples outside marriage and prenuptial agreements) to contract law (which deals with issues such as succession pacts).[25]

For example, as noted in section 3.1.1.1.1, the interpretation of the concept of residence may result in double taxation in the event of a cross-border inheritance since the states concerned may have different parameters for evaluating whether a person is a resident of their territory. I note that this is true even if the states concerned apply the civil law concept of residence. There are also other terms that are usually defined by the applicable civil laws, e.g. "death",[26] "estate", "heirs/beneficiaries", "surviving partner", "habitual abode", "permanent home", "movable property", "immovable property" and "receivable". Furthermore, the deadline for the acceptance of the inheritance, as determined by the law of succession, is often considered also for death tax purposes with regard to the time limit for the payment of the death tax. Finally, the applicable law of succession determines the fraction of the deceased's property, which each beneficiary is entitled to receive in the context of intestate taxation.

Finally, within the purview of the gift taxes, the applicable civil law usually defines the concept of donation and other terms of gift tax laws.

25 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 22.

26 See also, Guglielmo Maisto, "The pursuit of harmonisation regarding taxes on death and the international implications," *Bulletin for International Taxation* 65, no. 4/5 (2011): 254.

3.1.1.5.2 Private international law rules

In the case of a cross-border inheritance, the private international rules will be first considered for the determination of the applicable civil law, which will then also define some of the terms used for death tax purposes. Most legal systems contain private international laws that apply to a cross-border succession and determine which civil law governs the deceased's succession in the absence of international conventions.[27] In the case of a cross-border succession, therefore, those rules will apply first and indicate the relevant succession laws based on a chosen connecting factor. It is important to note that the private international rules do not indicate the death tax law governing the succession at hand, but only the relevant succession laws. In most states, the deceased's residence or domicile serves as the connecting factor[28] indicating the applicable succession laws. Accordingly, if the deceased was residing in State A at the time of his death, the succession laws of this state will apply. In some other states, the deceased's nationality indicates the applicable law of succession. Accordingly, if the deceased was a national of State B at the time of his death, the succession laws of this state will apply, regardless of his residence/domicile.

The choice of the connective criterion falls within the competence of the states, and each of the two above-mentioned connecting factors has its advantages and disadvantages. More specifically, the deceased's residence/domicile as a connecting factor dodges the application of foreign law by domestic courts, which might be difficult, especially for the administration of the estate.[29] On the other hand, the deceased's residence/domicile is prone to abuse by individuals who may immigrate to states with more favourable succession laws. This activity is often referred to as "succession law shopping". It was argued that such an abusive behaviour could be addressed if the deceased's nationality is taken as the connecting factor: the determination of the deceased's nationality is straightforward and does not involve multiple interpretations of the concept of residence.[30] According to Maisto, the advantages and disadvantages of each connecting factor make it hard to take a firm view on the most desirable connecting factor. He observed, however, that it is reasonable to endorse the prevailing view backed by scholars, which states that the connecting factor should be the deceased's nationality with the deceased having the right to designate the law of his residence as the civil law applicable to his succession.[31]

As noted above, the private international rules do not indicate the applicable *tax* laws. Instead, states apply their domestic death tax laws even if they (must) apply a law on succession of another state. I elaborate on this using the following example:

At the time of his death, the deceased was a resident of State A and his beneficiaries of State B. His property consisted of three apartments in state B. The deceased left no last will, therefore, intestate succession applied. According to State A's private international laws, the applicable law on succession is that of the deceased's last residence. State A

27 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 25.

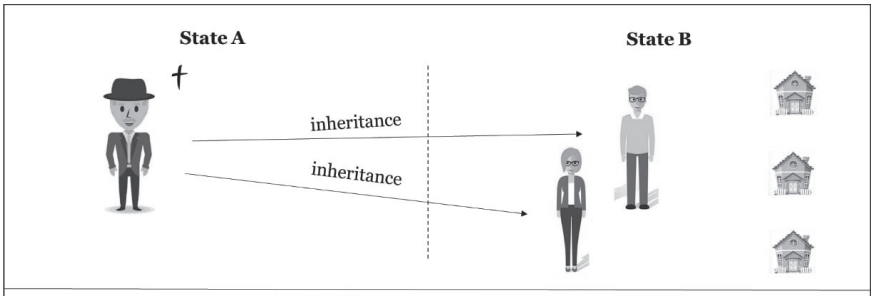
28 It is important to note the distinction between a "connecting factor" for private international rules and a "personal nexus concept" for death tax purposes.

29 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 26.

30 *Id*.

31 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 26.

will subsequently apply e.g. its inheritance tax laws on the worldwide inheritance as the deceased had a personal nexus with its territory. On the other hand, State B will apply its domestic succession laws based on the *lex rei sitae*[32] and then seek to levy e.g. inheritance tax based on the objective nexus, as seen by the example below.



Applicable law on succession	
State A's law on succession (deceased's last residence)	State B's law on succession (*lex rei sitae*)
Applicable inheritance tax law	
State A's inheritance tax law (personal nexus)	State B's inheritance tax law (objective nexus)

If, however, the applicable civil laws differ with regard to, for instance, the term "beneficiaries", double taxation is possible, as states will not grant double tax relief for a foreign tax paid by a person who is not considered a beneficiary under their domestic law of succession.

3.1.1.5.3 The EU Succession Regulation

As mentioned above, the choice of the connecting factor falls within the competence of the states. This is no longer the case within the EU because of the application of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter: the "EU Succession Regulation" or the "Regulation").[33]

The Regulation harmonised the EU Member States' private international laws on succession and applies to succession of persons who die on or after 17 August 2015. It follows from Article 1(1) of the Regulation that taxation falls outside the scope of the Regulation. It should, therefore, be for national law to determine, for instance, how taxes and other liabilities of a public-law nature are calculated and paid, whether these be taxes payable

32 *Lex loci rei sitae* is a Latin term that means 'law of the place where the property is situated.' The law governing the transfer of title to property is dependent upon, and varies with, the location of the property.

33 Regulation 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, 2012 O.J. L 201.

by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries. It should also be for national law to determine whether the release of succession property to beneficiaries under this Regulation or the recording of succession property in a register may be made subject to the payment of taxes."[34]

The legal basis of the EU Succession Regulation was Article 81(2) of the Treaty on the Functioning of the European Union (the "TFEU"), which forms part of the chapter "Judicial Cooperation in Civil Matters". This Article allows the EU to adopt measures particularly for the proper functioning of the internal market, aimed at ensuring, *inter alia*, (a) the mutual recognition and enforcement, between EU Member States, of judgments and decisions in extrajudicial cases, and (b) the compatibility of the rules applicable in the EU Member States concerning conflicts of laws and of jurisdiction. The Regulation does not apply to the UK, Ireland, and Denmark, which, based on certain protocols – 21 (UK and Ireland) and 22 (Denmark) of the TFEU – do not participate in the adoption of measures in this area.

Briefly, the Regulation provides for the deceased's habitual residence at the time of his death as the connecting factor for the determination of the applicable law of succession (Article 21(1) of the Regulation). Nevertheless, if it appears, from all the circumstances of the case, that a deceased was *manifestly* more closely connected with a state other than the state of his habitual residence, the law applicable to the succession shall be the law of that other state ("escape clause"). Under Article 22(1) of the Regulation, a person may choose the law of the state whose nationality he possesses at the time of making a choice or at the time of death to govern his succession. There is no escape clause in this case.

Although the Regulation does not define the term "habitual residence", the preambles no. 23 and no. 24 shed more light on this concept. The term should "reveal a *close and stable connection* with the State concerned taking into account the specific aims of this Regulation." (Italics, VD)[35] Such a close and stable connection is identified by "an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence".[36] Moreover, "[t]he deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located."[37]

Another point to keep in mind is that the applicable succession law can be any law, whether or not it is the law of an EU Member State.[38] Therefore, if the connecting factors of the Regulation designate the succession laws of a third state, these laws also embrace its private international laws as far as these rules make a *renvoi* to the law of an EU Member State or to the law of another third state that would apply its own law.[39]

34 *Id.*, preamble no. 10.
35 *Id.*, preamble no. 23.
36 *Id.*, preamble no. 23.
37 *Id.*, preamble no. 24.
38 *Id.*, Article 20.
39 Id., Article 34 (with certain exceptions). More on the concept of *renvoi*, see Dicey and Morris, *The Conflicts of Laws*, ed. Lawrence Collings (London: Sweet & Maxwell, 2012).

3.1.1.6 Qualification issues

According to the 2015 inheritance tax report, the number of different claims that the EU Member States may make with respect to assets may be multiplied because states might characterise the same property differently. The report provided the example of interests in the land, which some states may regard as real property and some other states as personal property. In cases where the land is held in an entity with a legal personality – such as a real estate company – a state may look through the entity and tax the land according to the situs principle. Another state may seek to tax the shares in the company[40] instead, based on the place of the domicile of the company. Differences of characterisation may thus occur if the states treat certain entities as transparent or opaque. This could result in double taxation, with one state taxing the real estate and the other the shares in the hybrid entity.[41]

3.1.1.7 Divergent valuation rules

The valuation of assets is an issue on which the diverse national legislation varies considerably. Some states consider the sale/fair market value of the property at the time of the deceased's death, others the cadastral value, and yet another may also consider a date after the deceased's death to value the assets. Consequently, two states may value the same property differently. Furthermore, the general valuation rules may grant several exemptions for specific kinds of property (for example, life insurance, non-interest-bearing financial assets, usufruct, undeveloped immovable property, listed stocks and shares, bonds, founders' shares, and state bonds). Therefore, it is likely that the state of the objective nexus will ascribe the property a higher value than the state of the personal nexus. If the latter state relieves double taxation by means of credit, one can observe that it may credit the taxes assessed under its domestic valuation rules. Double taxation could remain, however, with respect to the difference of the value of the property between the two states.

3.1.1.8 Divergent debt deduction rules

The different rules regarding the deduction of debts connected to the property may also give rise to double taxation. The state of the objective nexus may not grant any deduction of debts secured by the property that it taxes, or it may allow only the deduction of those debts that are charged on the property within its jurisdiction or that have an economic connection with such a property.[42] According to Goodman, if debts are equal to a substantial portion of the value of the decedent's total assets, there may be a significant amount of double taxation. If the state of the personal nexus provides full deduction of debts, and the state of the objective nexus does not grant any deduction of debts linked to the property sited there, double taxation may arise based on the difference between the tax that would

40 EU, *"Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU"*, report prepared by the European Commission Expert Group, 12, para. 4 (vi).

41 EU, *"Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU"*, report prepared by the European Commission Expert Group, 12, para. 4 (viii).

42 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b*, ed. IFA (London: IBFD, 1985), 37–38.

have been paid in the state of the personal nexus and the tax levied at the state of the objective nexus.[43]

3.1.1.9 Situs taxation

The taxation based on the situs of the property can also give rise to double taxation due to the different ways states tax based on the situs principle. First, the definition of the situs of a property may differ from state to state. This can often lead to double taxation as both states may consider an asset domestic. Double taxation relief is not in most cases available.

Furthermore, I note that defining the situs of the intangible property is far more complicated than that of tangible property, where the physical location of the tangible assets is decisive and is usually clearly visible.[44] On the other hand, the definition of the situs of intangible property is based on a notion[45] or mental concept.[46] Several examples have been mentioned in the literature.[47] For example, Maisto states that some states determine the situs of bank accounts and deposits based on the debtor's residence while others consider them liabilities incurred through a foreign permanent establishment (hereinafter: "PE").[48] Concerning copyrights, reference is made either to the state in which the literary work is published, the state in which the copyright may be enforced or the state in which the literary work was published.[49] Furthermore, the relevant situs criteria concerning corporate shares can be the domicile of the statutory head office of the corporation, the place of registration/incorporation, the social domicile of the corporation, the place where the share certificates are deposited or registered or the place of the register of the shareholders. Similar situs rules apply to corporate and government bonds.[50] In addition, the situs rules may differ as regards life insurance proceeds, book debts, mortgages and hypothecs, the interest of a beneficiary in a trust, partnership interests, personal effects of a deceased transient, ships and aircrafts.[51]

Double taxation arising due to the application of different situs rules is often a highly complex type of double taxation. Double taxation relief does not seem to work in the case of a conflict between two situs rules. In other words, relief is not often granted if both

43 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b*, ed. IFA (London: IBFD, 1985), 37–38.

44 See also Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 16.

45 See also, Wolfe D. Goodman, "The OECD Model Estate Tax Convention," *European Taxation* 34 (October/November 1994): 338.

46 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 13.

47 Frans Sonneveldt, "General Report: Avoidance of Multiple Inheritance Taxation within Europe," *EC Tax Review* 10, no. 2 (2001): 85.

48 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 42.

49 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 41.

50 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 30.

51 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b*, ed. IFA (London: IBFD, 1985), 32.

states consider that the property is situated in their territory. What is more, the state of the personal nexus will most probably grant relief for the taxes levied by the other state, which, according to its domestic law, is the state of the objective nexus. Thus, it is unlikely to provide relief for the taxes imposed by any other state that is not the state of the objective nexus under its domestic law. In that regard, Goodman provided an example of the situs rules of the state of the personal nexus according to which the shares of a corporation incorporated in that state are regarded as being situated there. Accordingly, this state will tax the shares in its capacity as the state of the personal nexus and consider in all events that the shares are located in its territory as the company is incorporated under its domestic law. However, under the situs rules of another state, the share certificates, which are physically located in its territory, are treated as domestic property. Therefore, this state may also seek to tax the share certificates based on an objective nexus. As a result, the shares may be taxed twice in two different states. Nevertheless, the state of the personal nexus will not usually grant double taxation relief for the foreign tax levied on the shares.[52]

3.1.1.10 The ineffectiveness of the unilateral double taxation relief

In light of all the problems arising from the application of national death and gift tax rules, one would expect that a unilateral relief for the avoidance of double taxation of inheritances would suffice for all potential double taxation conflicts (residence vs situs, residence vs residence and situs vs situs). Nevertheless, the effectiveness or even sometimes the availability of such relief by the state of the personal nexus should not be taken for granted.

First, not all states provide for relief for double taxation of inheritances and donations. Furthermore, such relief is sometimes granted for death taxes and not for taxes on gifts. In addition, relief may be granted only for federal taxes levied. Moreover, if relief is available, it is often granted only for the same type of death tax and tax on gifts. The state of the personal nexus may thus not grant a credit against e.g. its inheritance tax for the estate tax paid on the same property located in the other state. This, because a) the nature of the estate tax is different from that of the inheritance tax, and b) the taxable person differs. Likewise, the state of the personal nexus, which, for instance, levies an inheritance tax, may grant relief only for foreign-paid inheritance taxes and not for income or capital taxes levied *mortis causa*.[53] Furthermore, the state of the deceased's personal nexus may not grant relief if the other state taxes the worldwide estate based on the beneficiary's personal nexus. This, because both states tax the worldwide estate and double taxation relief is usually available in the event of a conflict between a personal and an objective nexus.

Sometimes the extent of the relief granted by the state of the personal nexus depends on the property that it would have taxed if it were the state of the objective nexus. Therefore, if this state defines its situs rights narrowly, it will probably grant a narrow relief. Of note

52 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b*, ed. IFA (London: IBFD, 1985), 36.

53 See also EU, "Consultation on possible approaches to tackling cross-border inheritance tax obstacles within the EU," summary of replies to the public consultation prepared by the European Commission, p. 4.

is that some states provide relief only for taxes on certain assets, for example, immovable property located abroad or a specific list of foreign assets.[54]

Moreover, the state of the personal nexus will not grant relief if the situs of certain property is under dispute. Consequently, the situs vs situs conflict – one of the three types of conflicts giving rise to double taxation – is not often addressed by the unilateral relief provisions. The same applies in the case of double taxation resulting from the residence vs residence conflict: if both states regard, for example, the deceased or the donor as a resident of their territory, they will not provide relief for the taxes levied in the other state as both states may seek to tax the deceased's or the donor's worldwide property.[55]

Furthermore, the 2015 inheritance tax report noted that the unilateral relief in some EU Member States is less efficient if the number of states involved exceeds two.[56] As mentioned above, the state of the personal nexus would provide relief only for the taxes levied abroad under its domestic situs rules.

Finally, if double taxation of inheritances is relieved by a foreign tax credit, then this credit means that the tax will be paid at the higher rate of the two taxes.[57] Furthermore, the credit is usually limited to the amount of the domestic tax that would be levied if the property is located in the state providing the credit ("ordinary credit").[58] Goodman argued in that regard that this might seem particularly unfair if the property is situated in two or more states other than the state of the deceased's residence and if one of those states levies tax at a higher rate and the other at a lower rate than the state of domicile.[59] Besides, the effectiveness of the double taxation relief is put at stake because of the different valuation and debt deduction rules. If the state of the personal nexus relieves double taxation using a credit, it will credit the tax levied on the foreign property as valued under its domestic valuation rules. Thus, the amount of the tax to be credited may be lower than the tax paid in the state of the objective nexus, if the latter state values this property at a higher amount. The same applies if the state of the objective nexus does not allow a deduction for any debt connected to the property located in its territory whereas the state of the deceased's personal nexus does.

3.1.2 Double or multiple non-taxation

Double or multiple non-taxation is the second important problem of cross-border death and gift taxation and, in my view, is attributable to various reasons. First, the national death

54 See also EU, "Consultation on possible approaches to tackling cross-border inheritance tax obstacles within the EU," summary of replies to the public consultation prepared by the European Commission, p. 4.

55 An exception often applies when a state taxes based on extended residence/domicile rules. The unilateral credit available by that state applies to taxes paid in the state of actual residence/domicile of the deceased.

56 EU, *"Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU"*, report prepared by the European Commission Expert Group, 13, para. 6 (iii).

57 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 36.

58 Inevitably, the highest rate within the two, three, or multiple jurisdictions will prevail. See further, Willem van Der Berg, "Future of Inheritance and Gift Tax Treaties," in *Tax Treaty Policy and Development*, eds. Markus Stefaner and Mario Züger (Vienna: Linde Verlag, 2005), 528.

59 Wolfe Goodman, *International Double Taxation of Estates and Inheritances* (London: Butterworth, 1978).

and gift tax laws vary significantly from state to state and those differences can often give rise to double or multiple non-taxation of a cross-border inheritance and donation. I call this situation "jurisdictional double or multiple non-taxation" (section 3.1.2.1). Moreover, double or multiple non-taxation can arise in certain situations where the state of the personal nexus provides a unilateral double taxation relief by means of an exemption (section 3.1.2.2). In addition, double or multiple non-taxation can arise in situations where the state of the objective nexus abstains from levying taxes (for the avoidance of double taxation) while the state of the personal nexus does not levy death taxes and taxes on gifts in general or provides for an allowance/exemption/deduction/credit (section 3.1.2.3). Finally, double or multiple non-taxation can arise in the case of tax abuse (section 3.1.2.4).

3.1.2.1 Jurisdictional double or multiple non-taxation

In this section, I will discuss some of the reasons why a cross-border inheritance and donation may not be taxed anywhere due to differences between death and gift tax laws of the states involved. In that regard, I note that this section builds on the notions discussed in section 3.1.1 of this study. Therefore, I refer to this section for the explanation of these notions.

Furthermore, not all the cases below of double or multiple non-taxation are relevant when I discuss the provisions of the OECD IHTMTC and its Commentary that could be improved in relation to the double or multiple non-taxation problem (section 5.2 of this study). This is because it could be argued that most of the cases below of double non-taxation are attributable to the lack of harmonisation of the OECD member countries' legislation. However, the OECD IHTMTC does not aim at harmonising these tax legislations.

3.1.2.1.1 Variety of concepts determining the personal nexus between a person and a state

As discussed in section 3.1.1.1, the application of different concepts for the determination of the personal nexus and their different interpretation by the states may often lead to double or multiple taxation of the cross-border inheritance and donation. In the same vein, the application of those concepts and/or their divergent interpretation can also give rise to double or multiple non-taxation in situations where the states concerned cannot establish a personal nexus and/or an objective nexus.

Consider, for example, a situation where the deceased is a resident of State A that levies inheritance tax on a worldwide basis based on the deceased's nationality. The deceased is a national of State B. His beneficiaries reside in State B. State B levies inheritance tax on a worldwide basis based on the deceased's residence. The deceased's property is located in State C that does not consider the deceased's property a "domestic asset" and therefore, it does not establish an objective nexus.

It follows from the above example that the cross-border inheritance at hand will not be taxed anywhere. State A will not seek to tax it because the deceased is not a national of this state. State B will also not seek to tax the inheritance at hand since the deceased is not a resident of its territory. The fact that the beneficiaries reside in this state is immaterial for State B tax purposes. Finally, State C will not seek to tax the cross-border inheritance

because it does not consider the property at hand a "domestic asset" for which an objective nexus is established.

3.1.2.1.2 Assessment of the personal link with a different person (donor and donee base)

As mentioned in section 3.1.1.2, not all states assess the personal nexus concepts (residence, domicile, nationality) at the level of the deceased. Some states establish worldwide tax jurisdiction if the beneficiary has a personal nexus with their territory. Due to this difference in the assessment of the personal nexus, double or multiple taxation non-taxation is conceivable in a situation where none of the states involved can establish a personal nexus and/or an objective nexus.

For example, the deceased A is a resident of State A, which levies inheritance taxes on a worldwide basis based on the beneficiaries' residence. Deceased A's beneficiaries reside in State B, which levies inheritance taxes on a worldwide basis based on the deceased's residence. The deceased's property is located in State C, which does not consider the property a "domestic asset". As a result, the cross-border inheritance of this example is not taxed anywhere as none of the states concerned will establish tax jurisdiction.

3.1.2.1.3 Connection with civil law

As mentioned in section 3.1.1.4, several terms used by the death and gift tax laws are usually determined by civil law (family law, matrimonial property law and the law of succession) whereas other terms are self-defined by the inheritance and gift tax legislation. The different interpretation of those terms, however, can give rise to double or multiple non-taxation in a situation where no personal nexus or objective nexus can be established by the states concerned.

For example, the interpretation of the concept of residence may result in double non-taxation of the cross-border inheritance if the states concerned apply different parameters for evaluating whether a person is a resident of their territory. For example, State A may consider that the deceased A is not a resident of its territory because he does not meet the 180-day test. State B may consider that the deceased A is not a resident of its territory because he does not meet the "animus" part of the civil law concept of residence. State C, the state where the deceased's property is located, applies its domestic civil law and thus does not consider the property to be a domestic asset. As a result, the cross-border inheritance at hand is not taxed anywhere.

3.1.2.1.4 Qualification issues

Qualification issues can give rise to double or multiple non-taxation of the cross-border inheritance and donation. In that regard, the 2015 inheritance tax report states the following: "Differences of characterisation may occur not only where ownership is split but also by virtue of the fact that some Member States, such as France, may treat certain entities as transparent or semi-transparent and others may treat them as opaque. This may result in

duplication of tax claims, or *double non-taxation*, with one state taxing the land and the other, for example, the shares in the entity." (Italics, VD)[60]

For instance, the deceased A is a resident of State A that establishes a personal nexus based on the deceased's nationality. The deceased A is not a national of State A. The deceased's property includes an interest in partnership operating in State B. The partnership holds immovable property in this state. State A will not establish a personal nexus as the deceased is not a national of this state. Furthermore, it will not establish an objective nexus as the property held by the partnership is located in State B. This state, however, may also not seek to tax the property if it considers the partnership opaque and interests in partnerships are not considered "domestic assets". As a result, the cross-border inheritance at hand is not taxed anywhere.

3.1.2.1.5 Situs taxation

As in the case of the qualification issues, I observed in section 3.1.1.9 that the situs rules of states may differ as regards life insurance proceeds, book debts, mortgages and hypothecs, the interest of a beneficiary in a trust, partnership interests, personal effects of a deceased transient, ships and aircrafts. Due to these differences, not only double or multiple taxation but also double or multiple non-taxation can arise. Inspired by Goodman's example of section 3.1.1.9, I observe that the shares of a company that form part of a cross-border inheritance may be left untaxed. For example, the deceased was a resident in State A at the time of his death. State A establishes a personal nexus based on the deceased's nationality. It also applies an objective nexus rule if the share certificates of companies incorporated under its laws are located in its territory. The shares certificates of the company at hand, however, are located in State B. Therefore, State A will not seek to tax. However, State B may also not seek to tax if it establishes an objective nexus based on the law under which the company has been incorporated. As the company at hand has been incorporated under the laws of State A, State B will not seek to tax.

3.1.2.1.6 Application of different types of taxes

Double non-taxation situations are conceivable where the states involved apply different types of death taxes and taxes on gifts. For example, the donor is a resident of State A at the time of the donation. The donee is also a resident of State A. State A levies a gift tax and establishes a personal nexus based on the donor's nationality. The donor, however, is not a national of State A and therefore, State A will not seek to establish a personal nexus with him. The donated property is located in State B that levies income taxes on gifts if the donees are resident in its territory. It also does not apply an objective nexus rule. As the donees of this example reside in State A, State B will not seek to levy income tax on the donation at hand. As a result, the donated property at hand is not taxed anywhere.[61]

60 EU, *"Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU"*, report prepared by the European Commission Expert Group, 9, para. 9, and 12, point viii.

61 I observe, however, that one could take the view that this is not a situation of double non-taxation because the taxes (that are not levied by each state) are not comparable.

3.1.2.2 Unilateral double tax relief by the state of the personal nexus

One could observe that the granting of a unilateral double tax relief (by means of an exemption) by the state of the personal nexus can give rise to double non-taxation of the cross-border inheritance and donation. For example, State A establishes a personal nexus if the deceased is a resident of its territory. Furthermore, it provides a unilateral double taxation relief by means of an exemption with regard to foreign-located property (regardless of whether the property is actually subject to tax abroad). If, however, this property is not actually taxed in State B (e.g. because it does not fall within the definition of "domestic assets" or because State B has abolished its death tax laws), the property is not taxed either by State A or by State B.

3.1.2.3 Unilateral abstention of the state of the objective nexus from taxing

In the same vein, one could observe that if the state of the objective nexus unilaterally abstains from levying death taxes and taxes on gifts e.g. in order to avoid double taxation, double non-taxation of the inherited or donated property is conceivable if the state of the personal nexus does not levy death taxes or taxes on gifts. One could arrive at the same conclusion if the state of the personal nexus grants an allowance/exemption/credit/deduction and therefore does not, in essence, tax the cross-border inheritance or donation at hand.[62]

3.1.2.4 Double or multiple non-taxation as a result of tax abuse

Finally, double or multiple non-taxation of the cross-border inheritance is possible in situations where an abusive element is present. For example, a person A is a resident of State A that establishes personal nexus based on the deceased's residence. The property of person A is located in State C. This property does not qualify as a domestic asset to which the objective nexus rule of State C applies. In order to minimize the tax burden on his property upon his death, person A decides to move to State B that does not levy death taxes. He dies two months after the transfer of his residence. In that regard, neither of the states involved will seek to tax the cross-border inheritance. The deceased A was not a resident of State A at the time of his death, State B does not levy death taxes in general and State C will not seek to apply a death tax based on an objective nexus rule as the property does not qualify as a domestic asset. Therefore, the cross-border inheritance will not be taxed anywhere due to an abusive transfer of residence.

I note that this category of non-taxation is, in principle, distinguished from the previous category as it prerequisites an abusive action of a person (e.g., in most instances, the person owning the property to be inherited). Furthermore, it focuses on the state of the personal nexus (rather than the state of the objective nexus). However, I note that double non-taxation is also conceivable if there is an abusive element for the establishment of the personal nexus with a state *and* the state of the objective nexus unilaterally abstains from

62 I note that the latter situation is called "factual double or multiple non-taxation" in the context of the OECD IHTMTC. As however, inheritance tax allowances and exemptions usually reflect the application of the windfall justification (section 2.4.2), one could take the view that this case of non-taxation should not be classified as "double or multiple non-taxation" from a legal point of view.

levying taxes (like in the case described in 3.1.2.3). This can be the case where the deceased abusively moves his residence to a state that does not levy death taxes and the state of the objective nexus abstains from taxing because it *assumes* that a tax is levied by the state of the personal nexus (thus, without establishing whether the state of the personal nexus levies a tax or taxes the inherited property from the very beginning).

Finally, I note that some states have introduced anti-abuse measures to safeguard their taxing rights in case of abuse[63] (e.g. extended residence/domicile rules).

3.1.3 Discriminatory treatment of cross-border inheritances and donations

3.1.3.1 Introduction

The application of discriminatory provisions is the third important problem of cross-border inheritances and donations. States tend to justify the application of less favourable provisions to cross-border inheritances and donations due to their cross-border element that differentiates them from the purely domestic ones. Such a cross-border element is often the deceased's or beneficiary's foreign nationality or residence and the foreign location of the inherited or donated assets or a combination of these elements. In the next section, I provide several examples of discriminatory death tax and gift tax provisions.

3.1.3.2 Examples of discriminatory inheritance and gift tax provisions

States can apply discriminatory tax provisions to several aspects of a cross-border inheritance and donation. Some examples of discriminatory inheritance and gift tax provisions are listed below.

3.1.3.2.1 Tax deductions for certain liabilities and debts

The death tax legislation of a state may preclude the deduction of debts and liabilities pertaining to domestic estates if the deceased is a foreign resident. In the case, however, of a resident deceased, such debts and liabilities would have been taken into account for the assessment of the death tax due. It follows that the cross-border element of the inheritance at hand is the deceased's foreign residence.

3.1.3.2.2 Subjective tax exemptions

Subjective tax exemptions are tax-free allowances or deductions granted to certain beneficiaries or donees due to their kinship with the deceased or the donor. In that regard, a state may provide for a smaller allowance for gift tax purposes in the case of a donation of immovable property located in its territory by a foreign resident donor. On the contrary, if

63 Andres Durán Preciado, "Inheritance and Estate Taxes: Tax Treaties, Connecting Factors and Worldwide Liability," *Bulletin for International Taxation* 72, no. 7 (2018). See also Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 90 and Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 14.

the donor had resided at the time of the gift in the same state where the donated property is situated, a higher allowance would have been available. It becomes apparent that the donor's foreign residence is the cross-border element of the donation at hand.

3.1.3.2.3 Objective tax exemptions

Objective tax exemptions are exemptions attached to certain types of property and are justified by several policies of the states.[64] Furthermore, they are mostly territorial, i.e. available for domestic assets. A state may deny, for instance, the granting of an exemption concerning the inheritance of the deceased's primary residence on the grounds of the beneficiaries' foreign nationality. On the contrary, if the beneficiaries had been nationals of the state where the primary residence is located, the inheritance of such residence would have been tax-exempt or assessed at a lower amount. The beneficiaries' foreign nationality is the cross-border element of this example.

3.1.3.2.4 Valuation rules

The death tax legislation of a state may provide for a different valuation method for domestic and foreign inherited assets. More specifically, a state may provide for a more burdensome valuation method applicable to foreign-located assets in comparison to domestic ones. It follows that the foreign location of the inherited assets is the cross-border element of the inheritance at hand.

3.1.3.2.5 Tax rates

The death tax legislation of a state may reserve the application of the death tax at a reduced rate to domestic non-profit institutions and not to similar foreign ones. In this case, the cross-border element of the inheritance at hand is the beneficiary's foreign residence.

3.1.3.2.6 Filing deadline

A state may require that, in the case of a cross-border inheritance and donation, foreign national beneficiaries file the death tax return within a deadline that is shorter than that applicable to national beneficiaries. The beneficiaries' foreign nationality is the cross-border element of the inheritance/donation at hand.

3.1.3.2.7 Payment deadline

The death tax legislation of a state may prescribe that resident beneficiaries pay the death tax due within six months from the filing of the tax return whereas non-resident beneficiaries may do so within three months. It follows that the beneficiaries' foreign residence is the cross-border element of the inheritance/donation at hand.

64 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 30.

3.1.3.2.8 Payment requirements

The death tax legislation of a state may prescribe that non-national and non-resident beneficiaries must provide a guarantee before the payment of the death tax. In the case they fail to provide this guarantee, they could have the totality of the succession assets located in this state blocked by the tax authorities of this state. The beneficiaries' foreign nationality and residence is the cross-border element of the inheritance of the example.

3.1.3.2.9 Penalties and fines

A state may provide for higher penalties and fines being imposed on non-resident beneficiaries compared to resident ones. Those penalties can relate, for instance, to a late, inaccurate or non-filing of the death tax return. It is apparent that the beneficiaries' residence is the cross-border element of the inheritance of the example.

3.1.4 Administrative difficulties

3.1.4.1 Introduction

Administrative difficulties associated with a cross-border inheritance and donation constitute the fourth important problem of cross-border inheritances and donations. Cross-border inheritances and donations are often exposed to difficulties of administrative nature simply because of their cross-border element. The establishment of worldwide inheritance and gift tax jurisdiction based on the deceased's or donor's personal nexus often gives rise to a situation where the tax is also levied on foreign-located inherited or donated assets. Thus, the state concerned must be aware of the deceased's or donor's total property, including property located abroad. In the same vein, the persons who are liable to pay the inheritance or gift tax may not reside in the state that establishes worldwide tax jurisdiction due to the deceased's personal nexus with its territory. This means that they must pay the tax in the latter state and, thus, deal with a foreign body and a procedure with which they are not familiar.

The 2015 inheritance tax report lists the administration of inheritance and gift taxes as one of the three significant obstacles in a cross-border setting.[65] While the 2015 inheritance tax report is EU-orientated, I recognise that these obstacles can be identified in cases involving both EU and international inheritances and donations. Under the report, the administration of inheritance taxes runs the risk of the following barriers:

- The inability of national administrations to understand the problems of cross-border inheritances,
- Burdensome duplication or multiplication of administrative procedures and reporting obligations,
- Difficulties in providing proof of payment of inheritance taxes,
- Delays due to the inability of tax administrations to resolve problems promptly, and
- Payment and cash flow problems.

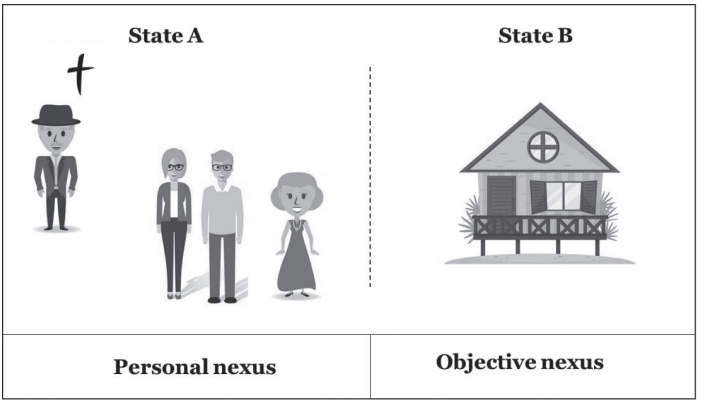
65 EU, *"Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU"*, report prepared by the European Commission Expert Group, 14-15.

I have decided to elaborate on the diversity of the obstacles arising with respect to the administration of cross-border inheritances and donations by means of an example.

3.1.4.2 The example of Mr D's beneficiaries

Mr D died in January 2015 while a resident of State A. His beneficiaries were also residents of State A. Mr D's estate included, amongst others, a summer house in state B. Both states' death tax laws include a worldwide tax liability (based on a personal nexus rule) and a limited tax liability (based on an objective nexus rule). It becomes apparent that State A taxes in its capacity as the state of the personal nexus and State B in its capacity as the state of the objective nexus. Furthermore, both states levy the same type of death tax, i.e. an inheritance tax.

Under the inheritance tax laws of State A, the entirety of the deceased's property is subject to tax there, including the summer house in state B. On the other hand, State B will also seek to tax the summer house since it is located in its territory.



Under state B's inheritance tax laws, the beneficiaries must itemise the estate by type, location, and value. Then, within two months from the deceased's death, file a declaration to the municipality, where the estate was registered, in one of state B's official languages. Subsequently, the municipality will determine the inheritance tax due – based on the guidelines of state B's tax authorities and then send a notification of payment to the beneficiaries. The inheritance tax due in State B must be paid within two months from the receipt of this notification.

Before travelling to state B, Mr D's beneficiaries unsuccessfully attempted to contact state B's tax authorities and the municipality. Consequently, they consulted a local accounting agency, which filed the declaration to the municipality on their behalf. In particular, they considered the two-month payment deadline very short. A few months later, the municipality informed Mr D's beneficiaries that the declared value of the summerhouse was too low. The process for the correct determination of this value took nearly a year and, hence, the inheritance tax due in State B was ultimately paid 14 months after the initial filing of the estate declaration.

Under State A's inheritance tax legislation, resident and non-resident beneficiaries must file a tax declaration within six months from the deceased's death. Moreover, a lump-sum payment of the tax due is, in principle, requested at the time of the filing. The payment of the tax may be deferred or divided into instalments under certain conditions, including the provision of a guarantee which, however, applies only to non-resident beneficiaries. Because State A's tax authorities were not certain whether there was property which is accessory to the summerhouse in state B, they sent a request for information to the tax authorities of state B. State B's tax authorities replied to this request six months later.

Under the inheritance tax laws of State A, double taxation is relieved by means of an ordinary tax credit for the taxes paid by the state of the objective nexus. Nevertheless, Mr D's beneficiaries could not obtain a credit in State A for the inheritance tax due in State B pending the assessment of the tax in the latter state. Moreover, State A's tax authorities were not eager to suspend the payment of the inheritance tax on Mr D's entire inherited property until the moment of the taxation of the summer house in state B, as requested. Such a suspension would, however, have allowed Mr D's beneficiaries to prove that the summerhouse has been taxed in state B.

Almost a year following the payment of the taxes in both states, Mr D's beneficiaries filed a refund request with State A's tax authorities, along with a certificate of the payment of the inheritance tax in state B. The application was accepted by the tax authorities who, however, imposed a fine and an interest payment because the deadline for the filing of the refund request had already expired. Thus, the credit for the foreign inheritance tax was effectively reduced to 75% of the total tax amount because of the delayed refund request.

The above example illustrates that a cross-border inheritance and donation is exposed to several and different administrative obstacles. I classify these problems in two categories based on the state in which they arise.

3.1.4.2.1 Problems arising in the state of the objective nexus

Assuming that the beneficiaries are residing in the same state where the deceased has his personal nexus at the time of the death, they must deal in the state of the objective nexus with a foreign body and an administrative procedure with which they are not familiar. Furthermore, these procedures may vary significantly from state to state. For example, the administration of inheritance and gift taxes in some states has been decentralised; the beneficiaries file a declaration with the competent municipality and not with the tax authorities' local office. They itemise the estate by type, location and value, and subsequently, the competent municipality computes the tax due based on the guidelines provided by the tax authorities. In addition, in federal states, the beneficiaries file the inheritance and gift tax declaration only in the district where the estate is located. Also, even in states where the tax authorities supervise the administration of inheritance and gift taxes, a court proceeding may be initiated. For instance, a copy of the estate's final inventory signed by the beneficiaries is sent to the local tax authorities and the probate court.

One more problem with which the beneficiaries are confronted at the state of the objective nexus is the tax officials' inability or limited experience in cross-border matters. As per the 2015 inheritance tax report, "[t]he complexity of the [inheritance taxes] has led to frequent complaints to the Commission by citizens that their national administrations do not understand the problems with which they are faced and are unable to answer their

questions as what they should do." However, the efficiency of the tax authorities (or any other competent body) in the state of the objective nexus is vital for the provision of the ordinary tax credit by the state of the personal nexus. In this respect, the valuation procedure of the situs property and the subsequent payment of the inheritance tax in the other state may take a considerable amount of time, not accounting for the possible disputes that may arise with the tax authorities of the state of the personal nexus or even a third state with respect to the situs of the inherited property. Thus, as per the 2015 inheritance tax, "[t]he inability of tax administrations to resolve problems reasonably promptly, whether acting alone or in the context of mutual consultations, results in delay in determining the nature and size of a liability and therefore taxpayers' interest payments and penalties being higher in cross-border situations than in purely national ones."[66] Finally, the inability of the tax administration to deal with a cross-border inheritance must be considered in parallel with the applicable inheritance tax legislation, which often governs domestic and cross-border inheritances under the same rules (for instance, with respect to the payment deadlines).

Eventually, one must keep in mind that language barriers can pose more obstacles in the event of a cross-border inheritance. The communication with the competent bodies could become bothersome if the competent contact persons are not well versed in English. Furthermore, language barriers might arise if the tax returns/estate declaration forms are available only in the official language(s) of the state of the objective nexus. Undoubtedly, a non-resident beneficiary will usually have to request the support of a third party (for instance, a law firm or an accounting firm), to assist in the filing of the necessary forms and documentation, and the general handling of the case.

3.1.4.2.2 Problems arising in the state of the personal nexus

The most significant problem arising in the state of the personal nexus relates to the availability of the credit for the foreign inheritance and gift tax paid in the state of the objective nexus. The beneficiaries have to demonstrate that they have actually paid the inheritance or gift tax in the other state in order to obtain this credit. While it appears rational for the tax authorities to require evidence regarding the foreign inheritance tax, the application of the same payment deadline for domestic and cross-border inheritances does, in my view, seem to be irrational. The time taken to assess and then subsequently pay the inheritance tax in the other state often exceeds the deadline for the payment of the inheritance tax in the state granting the credit. In this respect, the 2015 inheritance tax report states that "[d]elays by one State, sometimes in providing proof of payment of taxes, may also make it impossible for an individual to make claims for reliefs, allowances, exemptions or refunds within the time limits applicable in another State."[67] Moreover, even if the state of the personal nexus does grant a deferral of the payment of the inheritance tax, it may request a guarantee, which may not be required in the case of a domestic inheritance.

Only when the inheritance tax has actually been paid in the state of the objective nexus, do the beneficiaries become entitled to obtain a credit. If they have already paid the tax in the state of the personal nexus, the tax authorities will refund part of the tax paid.

66 EU, "*Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU*", report prepared by the European Commission Expert Group, 15.

67 *Id.*

Nevertheless, penalties and fines may be imposed, as the refund request may have been filed after the expiration of the statutory time limit for refund requests. Those penalties and fines reduce the amount of the inheritance tax credit considerably, even though the beneficiaries cannot be held accountable for the delay in the state of the objective nexus.

Moreover, the valuation rules of the state of the personal nexus may give rise to additional administrative problems. More specifically, this state may apply valuation rules that depend on the determination of the value of the estate in the state of the objective nexus. For example, the legislation of the state of the personal nexus may require that the value attributed to the foreign immovable property declared there should not be lower than the value on which the foreign inheritance tax was levied.

Furthermore, language barriers may also be a problem. It seems reasonable for the competent body overseeing the administration of the taxes to request a sworn translation of the relevant certificates granted by the other state. However, in a situation where the beneficiaries do not reside in the state of the deceased's personal nexus, unobstructed and comprehensible communication with the tax authorities of this state is necessary.

3.2 Confirmation of the selection of the problems

3.2.1 The OECD IHTMTC

3.2.1.1 An overview of the OECD IHTMTC provisions

Double taxation is undoubtedly the most significant problem to have triggered the interest of the international community, with attempts being made to address the situation as early as 1923. In that year, four acknowledged experts in fiscal matters – Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp – submitted their report entitled "Report on Double Taxation" to the Financial Committee of the Economic and Financial Commission of the League of Nations.[68, 69] In this report, the professors proposed a basis for reconciling the conflicting claims of the jurisdiction of personal nexus and that of the situs property. The report was followed by a second report prepared by the Committee of Technical Experts on Double Taxation and Tax Evasion in 1927. The 1927 report was submitted together with the "Draft Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties" to the League's Financial Committee. In 1928, a general meeting of government experts on double taxation and tax evasion filed its report, with a revised Draft Convention, to the League of Nations. Further draft conventions were prepared at one conference in Mexico City and one in London in 1943 and 1946 respectively.[70] All those endeavours preceded the Draft Double Taxation Convention on Estates and Inheritances ("the 1966 OECD IHTMTC"), which was adopted on 28 June 1966 by the Council of the OECD. Three years beforehand, namely on 30 July 1963, this same Council had adopted

68 See Gijsbert Bruins, Luigi Einaudi, Edwin Seligman and Josiah Stamp, Report on Double Taxation, Document E.F.S.73. F.19 (5 April 1923), accessed January 28, 2019, http://www.taxtreatieshistory.org.

69 See also, Wolfe D. Goodman, "The OECD Model Estate Tax Convention," *European Taxation* 34 (October/November 1994): 338.

70 *Id.*

the 1963 Income Tax Draft for the avoidance of double taxation on income and capital ("the 1963 OECD ICTMTC").[71]

The 1963 OECD ICTMTC was subsequently updated in the light of the experience that the OECD's Council had gained in the meantime and was presented on 11 April 1977 by the successor of the committee, the Committee on Fiscal Affairs. Subsequently, the Committee initiated the revision of the 1966 OECD IHTMTC to consider the current trends on estates, inheritance, and gifts and "[t]o adapt the 1966 Draft, where necessary, to the substance and form of the 1977 Income Tax Model".[72] It follows that the update of the OECD ICTMTC in 1977 triggered the discussions for an update of the OECD IHTMTC. Consequently, one had to assume that each of the concepts expressed in the same words in both the Model Conventions had the same application, wherever appropriate, to the different forms of taxation in question.[73] The committee presented the updated version of the OECD IHTMTC in 1982, accompanied by a recast of its Commentary.[74]

According to the introductory report of the model, the 1982 OECD IHTMTC takes into account the current trends in the OECD Member countries' attitudes towards the avoidance of double taxation and covers gift taxes. Furthermore, the model deals – to a certain extent – with the double non-taxation issue arising from the application of an inheritance and gift tax treaty or due to differences in domestic law classifications.

The inheritance and gift tax model has arguably contributed to addressing the double taxation problem associated with death and gift taxes and, in particular, taxes levied on inheritances, estates, and gifts. Furthermore, the Commentary of the OECD IHTMTC provides useful guidelines to states wishing to conclude an inheritance and gift tax treaty drafted along the lines of the OECD IHTMTC ("the inheritance and gift tax treaty"). It also permits the states to deviate from the Articles in the model and often suggests alternative language in that regard.

More specifically, the 1982 OECD IHTMTC applies to estates, inheritances, and gifts where the deceased/donor was domiciled at the time of his death in one or both the Contracting States. It also applies to gifts where the donor was domiciled in one or both Contracting States at the time of the gift (Article 1). Under paragraph 13 of the Commentary on Article 1 of the OECD IHTMTC, "[a]lthough the Article contains what could be called the "personal scope" of the Convention, it should be stressed that it does not apply to "persons" but to estates of, or gifts made by, persons domiciled in one or both of the Contracting States." On the contrary, I note that the OECD ICTMTC applies only to natural and legal persons (and thus not to estates). This is an important difference between the two models that differentiates their "personal scope".

Article 2(1) of the model stipulates that "[t]his Convention shall apply to taxes on estates and inheritances and on gifts imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied." Paragraph 2 defines the taxes to which paragraph 1 refers. Furthermore, under Article 3(2) of the model, "[a]s regards the application of the Convention by a Contracting State, any term not defined there shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies."

71 See Commentary on the OECD IHTMTC (Introductory Report), para. 1.
72 *Id.*, para. 3.
73 See Commentary on the OECD IHTMTC (Introductory Report), para. 14.
74 *Id.*, para. 13.

Article 4(1) of the OECD IHTMTC clarifies the concept of "fiscal domicile" as used in several Articles of the model: "the term 'person domiciled in a Contracting State' means any person whose estate or whose gift, under the law of that State is liable to tax there by reason of the domicile, residence or place of management of that person or any other criterion of a similar nature." It follows that the concept of "fiscal domicile" is broader than that of the common law domicile. Moreover, Article 4(2) of the OECD IHTMTC includes a tiebreaker rule that is very similar to that of the OECD ICTMTC to address cases where both Contracting States consider the deceased or the donor fiscally domiciled in their territory.

The model contains three distributive rules that are based on the economic allegiance theory.[75] Under Article 5, the immovable property that is situated in the Contracting State that is not the state of the deceased's or donor's fiscal domicile (the "other Contracting State"), *may be taxed* by that state. The same applies to movable property of a PE or a fixed base that is situated in the other Contracting State (Article 6 of the model). The remainder of the deceased's or donor's property *may only be taxed* by the Contracting State of the deceased's or donor's fiscal domicile ("the Contracting State of the fiscal domicile") at the time of the death/donation (Article 7 of the model). This applies, for example, to the immovable or movable property located in the Contracting State of the fiscal domicile or in a non-Contracting State. The same holds true for movable property located in the other Contracting State that does not pertain to a PE or a fixed base.

The deduction of debts under Article 8 of the OECD IHTMTC follows, in principle, the allocation of taxing rights between the Contracting States, in line with the economic alliance theory.

Articles 9A and 9B of the model refer to the elimination of double taxation by the Contracting State of the fiscal domicile with regard to property which "may be taxed" in the other Contracting State under Articles 5 and 6. Article 9A refers to the exemption method and Article 9B to the credit method.

Article 10 of the OECD IHTMTC contains a non-discrimination provision, which is identical to the nationality non-discrimination provision of the 1977 income and capital tax model.[76] Interestingly, although the OECD IHTMTC applies to estates and not to persons, the non-discrimination provision refers to persons. Furthermore, Articles 11 and 12 of the OECD IHTMTC refer, respectively, to the mutual agreement procedure and the exchange of information, both reflecting the language of the corresponding Articles of the 1977 OECD ICTMTC. It is worthy of note that the OECD IHTMTC – like the 1977 OECD ICTMTC – does not contain an Article on the assistance in the recovery of tax claims.

75 The economic allegiance theory is specified by two principles: the principle of true economic situs and the principle of domicile. See Gijsbert Bruins, Luigi Einaudi, Edwin Seligman and Josiah Stamp, Report on Double Taxation, Document E.F.S.73. F.19 (5 April 1923), accessed January 28, 2019, http://www.taxtreatieshistory.org/. See also, Wolfe Goodman, *International Double Taxation of Estates and Inheritances* (London: Butterworth, 1978), 56-57.

76 Interestingly, nationals of a state that has concluded an income tax treaty whose non-discrimination provision applies to non-residents and to any kind of taxes may benefit from this principle not only for income tax purposes, but also in estate, inheritance and gift tax matters. See Patricia Brandstetter, *"Taxes Covered": A Study of Article 2 of the OECD Model Tax Conventions* (Amsterdam: IBFD, 2011), 202: "Nevertheless, the OECD Tax Committee has stated that it is necessary to insert a non-discrimination clause in the estate, inheritance and gift tax treaties because the respective income tax treaty may not be applicable in certain case, e.g. where a treaty is unilaterally terminated by a contracting party" [or the scope of the non-discrimination provision of the income and capital tax treaty is limited to taxes covered by the treaty, VD].

Article 13 of the OECD IHTMTC refers to diplomatic agents and consular officers whose fiscal privileges, under the general rules of international law or other provisions of special agreements, prevail over the relevant inheritance and gift tax treaty.

Article 14 of the OECD IHTMTC refers to the territorial extension of the inheritance and gift tax treaty and Articles 15 and 16 of the OECD IHTMTC pertain to the entry into force and the termination of the tax treaty, respectively. These Articles, again, are similar to the corresponding Articles of the 1977 OECD ICTMTC.

Finally, Lang notes that "[i]n practice, a number of deviations from the [OECD IHTMTC] can be found. Many existing inheritance tax treaties – primarily those concluded before 1982 – are not applicable to gift taxes. Some treaties limit the scope to citizens of one of the two contracting states or tie it to tax liability. However, since a majority of OECD Member countries impose comprehensive tax liability if the deceased or the donor was domiciled in their countries, [Articles] 1 and 2 [of the OECD IHTMTC] were drafted accordingly."[77]

3.2.1.2 The objectives of the OECD IHTMTC

The primary objective of the 1982 OECD IHTMTC is undoubtedly to allocate taxing rights between the Contracting States[78] for the avoidance of double taxation of cross-border inheritances and donations[79] that takes place due to the parallel and uncoordinated application of the OECD member countries' inheritance and gift tax systems.[80] Such an allocation takes place through three distributive rules, Articles 5 to 7 of the OECD IHTMTC, as discussed in the previous section.

Furthermore, I observe that a few sections of the model deal with cases of double non-taxation arising from the application of an inheritance and gift tax treaty or the domestic law classifications. For example, I note that the Commentary on Article 7 of the OECD IHTMTC allows the other Contracting State to levy taxes on property that is not covered by Articles 5 and 6 under certain conditions for the avoidance of factual double non-taxation. More specifically, under paragraph 31 of the Commentary on Article 7 of the OECD IHTMTC, "[s]ome States, when giving up a taxation right in favour of another State under the Convention, may sometimes want to have the assurance that the tax which should then be levied in the other State can be collected there […]." It goes without saying that the other Contracting State usually gives up its taxation right concerning property that is not covered by Articles 5 and 6 of the tax treaty.

---

77 Michael Lang, *Introduction to the Law of Double Taxation Conventions* (Amsterdam: IBFD, 2013), 165.

78 Kevin Holmes, *International Tax Policy and Double TaxTreaties* (Amsterdam: IBFD, 2014), 58.

79 See also, in the context of income and capital tax treaties, Alexander Bosman, *Other Income under Tax Treaties. An Analysis of Article 21 of the OECD Model Convention*, (Alphen aan den Rijn: Kluwer Law International, 2015), 48.

80 See also Frank Engelen, *Interpretation of Tax Treaties under International Law*, (Amsterdam: IBFD, 2004), 428: "The primary purpose of a tax treaty [is] to avoid international juridical double taxation, in order to facilitate the international exchange of goods, services, capital, technology and persons." Perhaps, following the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter, "MLI"), the avoidance of double non-taxation through tax evasion or avoidance could be considered another purpose of an *income and capital tax treaty*. See, Article 6, para. 1 of the MLI.

In that regard, those who drafted the OECD IHTMTC noted that the Contracting State of the fiscal domicile would often need to be assisted by the other Contracting State in the collection of the tax on assets that are located in the other Contracting State. For this reason, the states were advised to conclude a convention for mutual assistance in the collection of taxes or a specific Article providing for such assistance for the taxes covered by the convention. Nevertheless, under paragraph 33, "[s]ome States, which for some reason could not conclude between themselves such a mutual assistance convention or Article, have adopted in their conventions another solution. This solution involves the addition to Article 7 of a second paragraph, which provides that the State in which the deceased or donor was not domiciled may impose its domestic tax to the extent that tax has not been paid in the State of domicile. This provision applies notwithstanding the provisions of paragraph 1 of Article 7, but does not apply where no tax was paid in the State of domicile as a result of a specific exemption, deduction, credit or allowance there. Member countries wishing to include such a provision are free to do so in their bilateral negotiations."

Furthermore, I observe that when discussing the conflicts of qualification due to differences in domestic law classifications, the Commentary on Article 7 of the OECD IHTMTC refers to situations where double non-taxation can arise. This is the case, for instance, of the interests in partnerships (paragraph 20 of the Commentary on Article 7 of the OECD IHTMTC). The same is true concerning the special features of the domestic laws of certain member countries as discussed in paragraph 28 and 29 of the Commentary on Article 7 of the OECD IHTMTC.

Finally, under paragraph 23 of the Commentary on Article 9B of the OECD IHTMTC, "[i]f the domestic law of the State of situs does not entitle it to make full use of the right to tax reserved to it by the Convention, then in order to avoid double non-taxation, Contracting States may find it reasonable in certain circumstances to make an exception to the obligation on the State of domicile to give exemption. In such cases it is left to States, in their bilateral negotiations, to agree upon the necessary modifications to the Article."

In addition, the model includes a nationality non-discrimination provision (Article 10 of the OECD IHTMTC) and two provisions that facilitate the administration of the cross-border inheritances and donations by the tax authorities of each Contracting State.[81] As a result, it could be argued that the model also aims at addressing certain cases of discrimination of cross-border inheritances and donations[82] and certain administrative difficulties of cross-border inheritances and donations[83] (perhaps as secondary purposes supportive to the main purpose of avoiding double taxation).[84]

81 Mutual agreement procedure (Article 11 of the OECD IHTMTC) and exchange of information (Article 12 of the OECD IHTMTC).

82 See, Commentary on Article 10 of the OECD IHTMTC.

83 See, Commentary on Articles 11 and 12 of the OECD IHTMTC.

84 See also Alexander Bosman, *Other Income under Tax Treaties. An Analysis of Article 21 of the OECD Model Convention*, (Alphen aan den Rijn: Kluwer Law International, 2015), 48. Bosman is of the view that other issues dealt with in tax treaties, such as the assistance in the collection of taxes and avoidance of discriminatory taxation are not to be considered a purpose of a tax treaty as such, or at most secondary purposes supportive to the main purpose of avoiding double taxation.

3.2.1.3 Why states do not often conclude inheritance and gift tax treaties

As previously mentioned, the OECD IHTMTC was first adopted in 1966 and subsequently updated in 1082. However, the model and its Commentary have not been updated since 1982. Furthermore, the current number of the inheritance and gift treaties is considerably low and there are OECD member countries that do not plan to conclude new inheritance and gift tax treaties with other countries. Such a policy decision may be based on different reasons, for example:

- the clear focus of the OECD and the OECD member countries on cross-border income and capital tax problems,[85]
- the clear focus of states on conclusion of income tax treaties with major trading states,[86]
- the divergent legislation giving rise to difficulties in negotiating inheritance and gift tax treaties,[87]
- the abolition of death and gift taxation in some states (which arguably mitigates the risk of double taxation in a cross-border setting),
- the incidental imposition of death and gift taxes[88] and the priority given by tax administrations to periodic taxes,[89]
- the low effective tax rate of inheritances,[90]
- the need for additional national negotiators specialised in death and gift taxes,
- the low contribution of death and gift taxes to the revenue inflow,[91]
- the small number of cross-border inheritances and donations,[92] and

85 See Inge van Vijfeijken, "One Inheritance, One Tax," *EC Tax Review* 26, no. 4 (2017): 216; "[…] Member States are busy with other, more prominent international issues, such as the OECD action plan on base erosion and profit shifting (BEPS). So on a macro level there is no urgent problem". See also J.F. Avery Jones, "A Comparative Study of Inheritance and Gift Taxes," *European Taxation* 34 (October/November 1994): 335.

86 J.F. Avery Jones, "A Comparative Study of Inheritance and Gift Taxes," *European Taxation* 34 (October/November 1994): 337.

87 J.F. Avery Jones, "A Comparative Study of Inheritance and Gift Taxes," *European Taxation* 34 (October/November 1994): 337.

88 Inge van Vijfeijken, "One Inheritance, One Tax," *EC Tax Review* 26, no. 4 (2017): 216; "[…] income tax is imposed annually. In that case, double taxation is an annually reoccurring event, which makes it an annually reoccurring problem. On average each taxpayer receives an inheritance only once in thirty year."

89 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 45.

90 Copenhagen Economics Institute, *Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU* (2010), 60. The study concludes that the effective tax rate has been decreased to around 3% in 2009.

91 According to the OECD revenue statistics, tax revenue from inheritance and estate taxes represented on average in 2018 0,4% of the total tax revenue earned in each OECD member country (OECD – average). See OECD revenue statistics, accessed January 29, 2020, https://stats.oecd.org/Index.aspx?DataSetCode=REV.

92 Copenhagen Economics Institute, *Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU* (2010), 12. The study estimates the number of cross-border successions in 2011 at between 290,000 and 370,000.

- the unilateral mechanisms for the avoidance of double taxation of inheritances and donations (which arguably make the need for concluding tax treaties in this area less demanding).[93]

Irrespective of the above reasons, the OECD IHTMTC serves as the first point of reference of this study. As I will discuss in the next chapter, the model includes provisions aiming at addressing the problems of cross-border inheritances and donations, thereby confirming their existence in the event of a cross-border inheritance and donation.

3.2.2 The 2015 inheritance tax report

Back in 2014, an expert group was set up with the primary task to assist the EC in identifying and finding practical ways to remove any tax problems faced by individuals who move from one EU Member State to another in order to live, study, work or retire, or who invest in other EU countries or inherit property across borders within the EU. The group consisted of 21 members – representatives of different sectors who were selected based on responses received to a public call for applications. The group decided to divide the work into two reports: one with a focus on direct taxes (mainly income taxes) and the other on inheritance taxes. Despite the similarities of the problems between income and inheritance taxes, the EC's expert group decided to address the inheritance tax problems in a separate report. According to the group, the differences concerning the tax event, the persons involved, and the applicable rates justify the consideration of inheritance tax obstacles in a separate report.

The first report was called "Ways to Tackle Cross-Border Tax Obstacles Facing Individuals within the EU" ("the 2015 income tax report"). It discussed the practical problems that individuals face with regard to income taxes in the EU, which the CJ could not address. The 2015 income tax report considered both the problems arising from mismatches between taxation rules that lead to higher taxation in cross-border situations ("substantive tax provisions") and the problems resulting from the absence of suitable practical and administrative procedures ("procedural tax problems").

This second report was entitled "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU" (the "2015 inheritance tax report"). Under this report, "[t]he number of people leaving property situated in two or more Member States when they die is growing rapidly. Many of their families will soon discover that tax on inheritance can often be claimed by each of the Member States concerned. It does not take long for multiple taxation, even at low rates, to amount to expropriation."[94]

The group identified the following inheritance tax obstacles in a cross-border situation:

- the nature and design of national inheritance taxes,
- provision of relief from double taxation by the EU Member States, whether by means of treaties or by means of unilateral relief, and
- the administration of inheritance taxes.

93 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 44.

94 EU, *"Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU"*, report prepared by the European Commission Expert Group, 5, para. 1.

I observe that the report regarded the nature and design of national inheritance taxes as an obstacle of a cross-border inheritance. Although differences in the national inheritance tax laws of the states seeking to tax a cross-border inheritance can often give rise to double taxation and administrative difficulties, I do not consider those differences a problem of cross-border inheritances and donations. On the contrary, the nature and design of national inheritance taxes is a domestic problem that thus, is taken as a fact in this study.

I consider the report an important point of reference of this study that confirms that cross-border inheritances and donations can be subject to double or multiple taxation and non-taxation and administrative difficulties. Furthermore, the report, drafted by distinguished scholars and practitioners, becomes a primary source of information on inheritance (and by analogy, gift tax laws) to which I will refer extensively in my study. Finally, in its report, the group proposed the innovative concept "one inheritance – one inheritance tax", which has been a great source of inspiration in my research as presented in chapter 8 of this study.

3.3 Addressing the problems at different levels

Having presented the four most important problems of cross-border inheritances and donations as confirmed by the two points of reference of this study, in this section I examine the level at which the problems can be resolved more effectively. In that regard, I discuss three different levels, namely the national level, the OECD level and the EU level.

3.3.1 The national level

In my view, the problems of cross-border inheritances and donations cannot be addressed effectively at the national level. More specifically, double or multiple taxation is often the result of jurisdictional overlaps between two or more states. Although it is true that some states provide a unilateral double tax relief, I noted in section 3.1.1.10 that such relief is often granted under "national standards". Moreover, the application of discriminatory tax provisions to cross-border inheritances and donations confirms that states fail to "think out of the borders". Finally, many administrative difficulties of cross-border inheritances and donations result from uncoordinated administrative procedures. It follows from the above that the notion of fiscal sovereignty is particularly evident in the national inheritance and gift tax legislations.

Although unilateral measures addressing the problems of cross-border inheritances and donations should always be welcomed, a coordinating approach is necessary. Such an approach can only be guaranteed at the OECD level or the EU level, or even at both levels.

3.3.2 The OECD level

The OECD IHTMTC has undoubtedly become a valuable tool for dealing with the problems of cross-border inheritances and donations. The model primarily aims at resolving the double taxation problem of cross-border inheritances and donations due to the parallel and uncoordinated application of the states' inheritance and gift tax legislations. It also aims at the avoidance of double non-taxation arising from the application of an inheritance and gift tax treaty or the domestic law classifications. It further includes a non-discrimination

provision and some provisions that facilitate the administration of the cross-border inheritances and donations by the tax authorities of each Contracting State.

It follows that the OECD level is a suitable level for addressing the problems of cross-border inheritances and donations. It could be argued, however, that certain provisions of the OECD IHTMTC and its Commentary can be improved, having regard to the objectives of the model and the principles reflected in its Commentary. In my view, a model that is in line with (some of) these principles seems to address the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these principles.

Furthermore, the low number of such treaties demonstrates, in my view, that the OECD member countries have not endorsed the model as readily as they did the income and capital tax model. A quick search of the IBFD online research platform (January 2020) reveals that at the time of the writing of this study there are only 87 inheritance tax treaties in force worldwide (some of which are also applicable also to gift taxes) contrary to 4060 income and capital tax treaties (a figure which changes regularly).[95]

3.3.3 The EU level

The EU level is a suitable level for addressing the problems of cross-border inheritances and donations. This is because at this level, not only are harmonisation or coordination mechanisms (that can guarantee a common approach towards addressing these problems) conceivable, but also enforcement mechanisms.

3.3.3.1 Double or multiple taxation

I observe that at the EU level very little progress has been made towards addressing the problem of double or multiple taxation of cross-border inheritances and donations. To start with, the EU fundamental freedoms do not provide protection against juridical double taxation, as first ruled by the Court in its judgment in *Kerckhaert and Morres* (C-513/04).[96] Although in the inheritance tax case *Van Hilten* (C-513/03) the Court did raise the importance of the unilateral credit for the foreign inheritance tax by the state of the deceased's extended residence (in the context of the Netherlands ten-year residence rule), it became apparent from its subsequent judgment in *Block* (C-67/08) that the EU Member States' legislatures are not obliged "[t]o adapt their own tax systems to the different systems of tax of the other Member States"[97]

"30. Community law, in the current stage of its development and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community. Consequently, […] no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level (see Kerckhaert and Morres, paragraph 22, and Columbus Container Services, paragraph 45)."[98]

95 The possible endorsement of the updated model by the OECD member countries falls outside the scope of this study because such an endorsement depends on the tax policy of each country.
96 ECJ, *Kerckhaert and Morres* (C-513/04).
97 ECJ, *Block* (C-67/08), para. 31.
98 *Id.*, para. 30.

Although to date, such a uniform or harmonisation measure has not been proposed in the EU (albeit possible, in principle, under Article 115 TFEU), a coordinating measure had been proposed in 2011. This measure is the EC's recommendation 2011/856/EU of 15 December 2011 regarding relief for double taxation of inheritances (hereinafter: the "EC's recommendation" or the "recommendation"). The recommendation aims to coordinate the EU Member States' systems on relief for double taxation of inheritances and donations. In the EC's view, if the EU Member States follow the recommendation and integrate its provisions in their national inheritance and gift tax systems, the juridical double taxation problem of inheritances can be resolved.[99] Nevertheless, as the EC's expert group stated in its report, several years have passed since the adoption of the recommendation, and it seems that it has failed to generate sufficient action and is not going to lead to any fundamental change in the approach of EU Member States to the problem of double taxation of inheritances.[100, 101]

3.3.3.2 Double or multiple non-taxation

As in the case of double or multiple taxation, very little progress has been made towards addressing the problem of double or multiple non-taxation of cross-border inheritances and donations. In that regard, I observe that Article 4.2. of the EC's recommendation 2011/856/EU deals with double non-taxation issues. More specifically, Article 4.2. of the recommendation precludes the EU Member State of the objective nexus to tax the movable property (other than movable property connected to a PE) "[p]rovided that such tax is applied by another Member State by reason of the personal link of the deceased and/or the heir to that other Member State". This Article is particularly effective in situations involving more than two EU Member States. This is because the EU Member State of the objective nexus is precluded from exercising its taxing rights *only* if the EU Member State of the deceased's or beneficiaries' personal nexus taxes. On the contrary, the EU Member State of the objective nexus may still exercise its taxing rights if no tax is levied by either the EU Member State of the deceased's or the beneficiaries' personal nexus. Therefore, Article 4.2. deals both with double or multiple taxation and double or multiple non-taxation issues.

However, as previously noted, the EC's expert group was of the view that several years have passed since the adoption of the recommendation, and it seems that it has failed to generate sufficient action and is not going to lead to any fundamental change in the approach of EU Member States to the problem of double taxation of inheritances.[102] This is also true, in my view, for the problem of double non-taxation of inheritance in general (to which the report of the EC's expert group refers, in places, despite the fact that the group did not classify double or multiple non-taxation as an obstacle of cross-border inheritances).

---

99 Edouard-Jean Navez, "The Influence of EU Law on Inheritance Taxation: Is the Intensification of Negative Integration Enough to Eliminate Obstacles Preventing EU Citizens from Crossing Borders within the Single Market?," *EC Tax Review* 21, no. 2 (2012): 93.

100 However, as per the report, the recommendation has not been entirely ignored. For example, in 2011, it was debated in the Polish legislature and the Netherlands' finance minister has stated that the Netherlands' unilateral relief will be applied more liberally.

101 EU, *"Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU"*, report prepared by the European Commission Expert Group, 18, para. 10.

102 EU, *"Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU"*, report prepared by the European Commission Expert Group, para. 9, p. 9 and point viii, p. 12.

3.3.3.3 Discrimination

On the other hand, the negative harmonisation[103] of EU Member States' inheritance and gift tax legislation has been remarkable concerning the discrimination problem of cross-border inheritances and donations. The Court has delivered several judgments on inheritance and gift taxation, an area of tax law that seemed to be *terra incognita* concerning its examination under EU law 20 years ago.

In 2011, the EC published its Working Paper laying down the principles drawn from the Court's case law for non-discriminatory inheritance tax systems (the "2011 EC's Working Paper").[104] In the EC's view, "[i]t is of utmost importance in the Internal Market that Member States do not pose obstacles to the exercise of the fundamental freedoms by discriminating against cross-border inheritance cases compared to domestic situations. The principle of non-discrimination is a central element of the Treaty freedoms."[105] Moreover, the Court judgments "[h]ave brought a certain amount of clarity and certainty to this matter. However, in some instances, it may not be entirely clear what consequences a ruling involving legislation of one Member State should have on legislation of another Member State. Moreover, even where the Member States introduce new tax rules as a result of a ruling, they may do so in vastly differing ways."[106] Furthermore, under the 2011 EC's Working Paper, the Court judgments in individual cases may not make clear to EU citizens what principles Member States must respect when taxing cross-border inheritances.[107]

Before the publication of the 2011 EC's Working Paper, the EC's Directorate-General for Taxation and Customs Union commissioned the Copenhagen Economics Institute to prepare a report on the problems of cross-border inheritances within the EU. This report was published in August 2010, and is called "Study on Inheritance Taxes in the EU Member States and Possible Mechanisms to Resolve Problems of Double Inheritance Taxation in the EU". Although the report focused mainly on the double taxation problem of inheritances in the EU, it briefly covered the discrimination problem of cross-border inheritances as well as the relevant Court judgments delivered up to its publication. In my view, the addition to the research in this report is the overview of the potential discriminatory elements of the EU Member States' inheritance and gift tax legislations. The overview is annexed to the report.

The Court's case law on EU inheritance and gift taxation has already dealt with significant elements of inheritance and gift taxes, among others:

- Special tax deductions for certain liabilities and debts [e.g. obligation to transfer title – *Barbier* (C-364/01), mortgage debt – *Eckelkamp* (C-11/07), overendowment debt – *Arens-Sikken* (C-43/07)],
- Subjective tax exemptions [*Geurts* (C-464/05), *Mattner* (C-510/08), *Welte* (C-181/12), *Hunnebeck* (C-479/14), *Commission v Germany* (C-211/13)],

103 The protection against discriminatory (tax) provisions is safeguarded through the Court, which interprets and applies the EU fundamental freedoms. Such a process represents the so-called "negative harmonisation".

104 European Commission Staff Working Paper, "*Non-discriminatory Inheritance Tax Systems: Principles Drawn from EU* Case law" prepared by the European Commission (SEC(2011) 1488 final).

105 *Id.*, 3.

106 European Commission Staff Working Paper, "*Non-discriminatory Inheritance Tax Systems: Principles Drawn from EU* Case law" prepared by the European Commission, (SEC(2011) 1488 final), p.3.

107 *Id.*

- Objective tax exemptions [*Commission v Greece* (C-244/15), *Commission v Spain* (C-127/12), *Q* (C-133/12), *Huijbrechts* (C-679/17)],
- Valuation rules [*Jäger* (C-256/06), *Halley* (C-132/10), *Scheunemann* (C-31/11)],
- Extended residence rules [*Van Hilten* (C-513/03)],
- Reduced rates for domestic non-profit organisations [*Missionwerk Werner* (C-25/10), *Commission v Greece* (C-98/16)], and
- Reductions for the previously paid inheritance tax [*Feilen* (C-123/15)].

I believe that the Court's case law on EU inheritance and gift taxation is a *sui generis* case law. Although this case law builds on the concepts that it developed in its case law on personal taxation, it correctly deviates from them due to the different nature of inheritance and gift taxes from that of income taxes. This is, for instance, the case of the *Schumacker* doctrine whose application was rejected by the Court in inheritance and gift tax cases while it continues to apply to income taxes (albeit with certain exemptions).

In the context of the EU fundamental freedoms, a cross-border inheritance denotes an inheritance involving a foreign-located estate, a foreign-located deceased, a foreign-located beneficiary or a combination of all the above elements. Furthermore, the free movement of capital, as protected by Article 63 TFEU, is the most commonly invoked freedom in the context of inheritance and gift taxation. The Court has consistently maintained that an inheritance comes within the scope of the TFEU provision of the free movement of capital, save where the constituent elements of inheritances are confined to a single EU Member State. The Court considers an inheritance a movement of capital based on heading XI of Annexe I to the Directive 88/361,[108] entitled "Personal Capital Movements". Hence, the *mortis causa* transfer of property is not regarded as an investment made by the deceased for his beneficiaries. In my view, the examination of national inheritance tax law provisions in light of the free movement of capital is critical. This freedom is unique in comparison to other EU fundamental freedoms as it covers third-country transactions, and thus inheritances whose cross-border elements are located in a third state. Likewise, the free movement of capital also applies to cross-border donations.[109]

Nevertheless, I observe that more research is required on certain aspects of the Court's case law for the better understanding and application of the non-discrimination principle within the EU. Furthermore, it is not only the EU Member States' inheritance and gift tax laws that should be interpreted in line with EU law but also the treaties that they have concluded (at least, the treaties concluded between EU Member States).

3.3.3.4 Administrative difficulties

I note that the EU has already introduced measures, which aim at the better cooperation between the EU Member States' tax authorities in relation to the exchange of information and the recovery of tax claims.

108 Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty.

109 More on the Court's case law on EU inheritance and gift taxes, see Vasileios Dafnomilis, "A Comprehensive Analysis of ECJ Case Law on Discriminatory Treatment of Cross-Border Inheritances – Part 1," *European Taxation* 55, *no*. 11 (2015); Vasileios Dafnomilis, "A Comprehensive Analysis of ECJ Case Law on Discriminatory Treatment of Cross-Border Inheritances – Part 2," *European Taxation* 55, *no*. 12 (2015).

First, exchange of information on death and gift taxes already takes place within the EU under the EU Directive 2011/16/EU on administrative cooperation in the field of taxation. The Directive applies to all types of taxes and therefore, death and gift taxes fall within the exchange of information framework that the Directive has introduced. More specifically, under Article 1(1) of the Directive, "[t]his Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2." Under Article 2, "1. This Directive shall apply to *all taxes of any kind* levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities." (Italics, VD). As Article 2 does not explicitly exclude death and gift taxes from the scope of the Directive, EU Member States may exchange information regarding these taxes under the conditions laid down in Chapter II of the Directive.

Moreover, the EU Directive 2010/24/EU lays down rules on the assistance in the collection for the recovery of claims relating to taxes, duties and other measures of taxes between the EU Member States. Death and gift taxes also fall within the scope of this Directive. Under Article 2 of the Directive, "1. This Directive shall apply to claims relating to the following: a) all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union; […]".

Although both EU Directives apply to death and gift taxes, some of the problems of Mr D's beneficiaries, as presented in section 3.1.4.2, might remain unsolved. This is because the available legal framework within the EU aims at the effective collaboration between the EU Member States' tax authorities. On the contrary, the available legal framework within the EU does not deal with administrative issues arising at the micro level.

3.4 Conclusion of Chapter 3

In this chapter, I examined the essential problems of cross-border inheritances and donations: double or multiple taxation, double or multiple non-taxation, discrimination and administrative difficulties. These problems are confirmed, in my view, by the OECD IHTMTC and the 2015 inheritance tax report both of which serve as the two points of reference of this study. Furthermore, as previously noted, there could also be other problems of cross-border inheritances and donations. However, those problems fall outside the scope of this study as they do not seem to have been confirmed by the two points of reference of this study.

I further noted that the problems could not be effectively solved at the national level although unilateral measures should be welcomed in that regard. In my opinion, a more coordinated approach is required for addressing the problems. Such an approach can only be safeguarded at the OECD or the EU level because both levels provide for mechanisms to ensure a coordinated approach.

At the OECD level, the OECD IHTMTC is undoubtedly a valuable tool for addressing the problems. This is true regardless of the fact that the number of inheritance and gift tax treaties is not impressing. It could be argued, however, that certain provisions of the OECD IHTMTC and its Commentary can be improved, having regard to the objectives of the inheritance tax model and the principles reflected in its Commentary. In my view, a model that is in line with (some of) these principles seems to address the problems of

cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these principles.

At the EU level, I observed that to date, no harmonisation measure had been proposed to address the problems of cross-border inheritances and donations. Only the EC's recommendation has attempted to coordinate the EU Member States' unilateral double tax relief provisions, but it seems to have failed to achieve this objective. Furthermore, the Court's case law has contributed to the so-called "negative harmonisation" of death taxes and taxes on gifts. However, the Court's case law has, in my view, two aspects that can be further discussed and explained, and the EU Directives 2011/16/EU and 2010/24/EU do not deal with administrative problems of cross-border inheritances and donations at the micro-level.

In conclusion, I would suggest that both the OECD and the EU levels are appropriate to address the problems of cross-border inheritances and donations because, as stated above, both levels provide for mechanisms to ensure a coordinated approach. First, at the EU level, the OECD IHTMTC and its Commentary serve as the basis for treaty negotiations. Second, at the EU level, the issuance of EU legislation is possible and can thus provide "separate" and "holistic" solutions to the problems of cross-border inheritance and gift taxation.